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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

THOMAS EWING PARKS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on July 29, 1965.

OPINION BELOW

The opinion of the Court of Appeals is reported at 349 F. 2d 20, and is printed as Appendix A in petition of co-petitioner Hoffa, No. ....., this term, which we incorporate herein.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*) was entered on July 29, 1965. A timely Petition for Rehearing was denied on October 7, 1965. On October 19, 1965, Mr. Justice Stewart extended the

time for the filing of a petition for a writ of certiorari for an additional 30 days, to December 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, after a conspiracy count in the indictment against one defendant was severed before trial, it was here proper to try, at a single joint trial, and submit to a jury the substantive counts of the indictment charging each defendant with an independent and unrelated offense.

2. Where the two chief and only trial witnesses against petitioner made statements to the F.B.I., and one, additionally in an affidavit, materially and directly contradictory to their trial testimony, did the willful and deliberate destruction by the F.B.I. of its original records of its interviews with these witnesses prevent petitioner from fully demonstrating all the material contradictions and destroy the full and adequate cross-examination to which petitioner was constitutionally entitled?

3.[1] Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth

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[1] The foregoing questions are discussed in this petition as reasons for granting the writ. On the questions numbered 3 through 10 petitioner adopts the reasons for granting the writ which are advanced by co-petitioner Hoffa in his petition, No. ...., this term. On the questions numbered 11 through 13 petitioner adopts the reasons for granting the writ which are advanced by co-petitioner King in his petition, No. ...., this term. On the question numbered 14 petitioner adopts the reasons for granting the writ advanced by co-petitioner Campbell in his petition, No. ...., this term.

and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.

4. Whether petitioner was denied a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments by reason of:

(a) The Court's refusal to postpone the trial in Chattanooga because of continuous prejudical publicity, even though the Court, three weeks earlier, had found that substantially identical publicity made fair trial for petitioner impossible in Nashville.

(b) The prejudicial effect upon the jury of the Government's constant guarding of the jury and Government witnesses by an extraordinary number of Marshals.

5. Whether petitioner was denied a fair trial because admitted Government surveillance conducted prior to and during trial engendered such fear in petitioner and his counsel as to deny him effective assistance of counsel and to impair his right of private consultation with counsel.

6. Whether petitioner was deprived of a fair trial by the erroneous admission and retention of highly prejudicial evidence (including a transcript of a trial judge's statements in a former prosecution against co-defendant Hoffa) in support of the count on which petitioner was convicted and without according him his constitutional rights of confrontation and cross-examination.

7. Whether the indictment of petitioner was invalid by reason of: (a) the delegation of the Jury Commission's duties of grand jury selection to non-official "suggestors" (consisting primarily of bankers, Post-

masters, and State Court officials, and not including any wage earner, manual laborer, or representative of organized labor) and the Jury Commission's blanket acceptance of the persons supplied by the "suggestors" without any investigation or examination by the Jury Commission to determine whether such persons were qualified or constituted a cross-section of the community; (b) the trial court's refusal to grant petitioner a hearing to prove improper delegation of the duties of the Jury Commission in selecting the grand jury, and the systematic exclusion of elements of the community from the grand jury venire; and (c) the failure of the Court in voir dire examination to inquire whether the members of the Grand Jury panel were biased against petitioner because of prejudicial publicity against him relating to the impending Grand Jury investigation.

8. Whether a Government agent's hearsay testimony of the alleged knowledge of a grand jury witness, who refuses to testify on the claim of Fifth Amendment privilege, constitutes probable cause for indictment.

9. Whether a defendant is deprived of a fair trial:

(a) When jury instructions to apply the law of conspiracy are repeatedly given throughout a trial from which the conspiracy count has been severed on a judicial finding of prejudice; and

(b) When the trial judge abandons to the jury his function of determining the existence of *aliunde* evidence of conspiracy in admitting the declarations of alleged co-conspirators against a non-present alleged conspirator.

10. Whether a defendant is deprived of a fair trial by the prosecutor's statements in final argument to the jury:

(a) That a co-defendant's consultation with counsel and participation in his own trial indicates his guilt; and

(b) That the prosecutor personally believes the defendants to be guilty.

11. Whether, in the circumstances of the trial in this case, there was prejudicial error in curtailing and limiting the cross-examination and impeachment of the main Government witness, Partin, including

(a) the denial of an opportunity to cross-examine Partin with respect to recordings of telephone conversations with co-petitioner Hoffa,

(b) the refusal to permit the witness Reynolds to testify that Partin had attempted to suborn his testimony in confirmation of Partin's testimony, and

(c) the exclusion of the testimony of Mrs. Partin, who had been subpoenaed by the defense.

12. Whether the trial court committed prejudicial error in refusing to give a cautionary instruction as to the testimony of informer Partin and in instructing that a witness is presumed to testify truthfully.

13. Whether there was prejudicial error in the trial court's refusal to declare a mistrial because of

(a) the prosecutor's cross-examination of co-defendant King concerning said co-defendant's invoking the Fifth Amendment privilege in a prior and connected proceeding;

(b) the prosecutor's cross-examination of co-defendant Hoffa as to whether he had told King to invoke the Fifth Amendment privilege; and

(c) the prosecutor's statement in final argument to the jury that King had invoked the Fifth Amendment privilege.

14. Whether the trial court committed prejudicial error in denying a hearing to determine whether or not the petit jury was chosen in such a manner as to exclude cognizable elements of the community.

In addition to the above questions, if the writ be granted without limitation, the petitioner reserves argument on the merits of the following questions:

15. Whether the court committed prejudicial error in refusing to disclose to the defense for impeachment purposes the Grand Jury testimony of the key Government witness.

16. Whether the evidence was sufficient to sustain the conviction.

17. Whether the testimony of Government witness Partin should have been suppressed on the ground that it was paid for by the Government in violation of 18 U.S.C. 201(h).

18. Whether the trial court committed prejudicial error

(a) in refusing to order production of a Government agent's notes on an informer Government witness' reports to such agent; and

(b) in refusing to order production of Government reports for the purpose of determining what Government evidence was the fruit of the interception and recording of telephone conversations between co-petitioner Hoffa and Government informer Partin.

STATUTES AND RULES INVOLVED

1. Title 18, U.S.C., Section 1503 provides in pertinent part:

> Whoever corruptly * * * endeavors to influence, intimidate, or impede any * * * petit juror * * * in the discharge of his duty * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. Title 18, U.S.C., Section 2 provides in pertinent part:

> Whoever * * * aids, abets, counsels, commands, induces, or procures [the commission of an offense against the United States] is a principal.

3. Rule 8(b), F. R. Crim. Proc. provides:

> *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

4. Rule 14, F. R. Crim. Proc. provides:

> *Relief from Prejudicial Joinder.* If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

5. Title 18, U.S.C., Section 3500, provides in pertinent part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

STATEMENT

From October 22 to December 23, 1962, Co-defendant Hoffa was tried in Federal Court at Nashville, Tennessee on a charge of violating the Taft-Hartley Act (II D.A. 584a-590a).[2] The trial ended with a hung jury (II D.A. 591a). During the course of the trial venireman Tippens and jurors Paschal and Fields were

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[2] "D.A." references are to Appellants' Joint Appendix as printed for the Court of Appeals. "G.A." references are to the Government's Appendix as printed for the Court of Appeals. "T." references are to the typewritten transcript of the trial proceedings in this case, which transcript is on file with the Court.

excused (II D.A. 589a; IV D.A. 1963a). That case is referred to herein as the Test Fleet case.

On May 9, 1963, an indictment was returned in Federal Court in Nashville containing five counts. Count III charged petitioner with endeavoring to influence juror Fields in the Test Fleet case. This count also charged co-defendants Hoffa and Campbell with aiding and abetting petitioner.

Counts II and V, respectively, charged defendants Medlin and King with endeavoring to influence, respectively, jurors Tippens and Paschal. Count IV charged defendant Tweel with contacting one Dallas Hall to induce him to communicate with unnamed jurors to influence their decision. Hoffa was charged in each of these counts as an aider and abetter.

Count I charged only Hoffa with a conspiracy with the defendants named in the substantive counts to influence petit jurors Tippens, Fields and Paschal and other unnamed jurors in the Test Fleet case (I D.A. 66a-71a).

Count I was severed for trial (I D.A. 15a, 199a). The case was tried at Chattanooga, Tennessee only on the substantive counts. Petitioner was convicted (VII D.A. 3291a), and sentenced to a term of imprisonment of three years (VII D.A. 3568a).

1. Deprivation of Fair Trial—by the trial Court's failure to grant a severance both prior to trial and during the course of the trial

As we have noted, the four substantive counts charged four separate offenses, each having a different principal. Co-petitioner Hoffa was charged as an aider and abetter in each of them.

There is no averment in any count, nor was any evidence introduced, to the effect that petitioner had any knowledge of, participation in, nor common cause with, any of the principals named in any other count, nor with the offenses there alleged.

Prior to trial, the Court severed for trial Count One, the conspiracy Count, which only charged Hoffa, for the reason that "there was inherent prejudice to all defendants in the joinder of the conspiracy count" (I D.A. 15a, 199a). Motions timely made and strenuously urged for the severance for trial of Count III from the other counts, and for the severance of petitioner's trial from that of defendant Hoffa, were denied (I D.A. 15a, 196a-202a). During the course of the trial petitioner repeatedly moved for a severance and mistrial as the evidence adduced by the Government demonstrated that petitioner was prejudiced by a joint trial of the various substantive counts (I D.A. 29a, 33a, 34a, 35a, 36a, 38a, 39a, 40a, 44a, 46a, 47a, 48a, 50a, 51a, 55a, 57a).

In the trial of the case, the trial court permitted the jury to consider the evidence admitted as to Counts II, IV, and V against petitioner on the theory of conspiracy law (II D.A. 611a-615a, 639a-645a, 733a, 770a, 771a; III D.A. 1352a, 1397a, 1421a, 1442a). Because of the prejudice thus engendered by the joint trial, petitioner renewed his motion for severance (II D.A. 617a).

During the cross-examination of witness Partin the prosecution disclosed that Partin's first contact with the Government was in reporting to it an alleged threat by petitioner Hoffa to kill then Attorney General Kennedy (III D.A. 1540a). As a result of such report, Partin became an informer. Petitioner asked

to be permitted to cross-examine Partin concerning this initial contact and arrangement of Partin with the Government (III D.A. 1551a). Because other defendants objected to such examination, the Court denied the petitioner the right to so cross-examine the witness (III D.A. 1548a-1549a). Motions of petitioner for a mistrial and severance were overruled (III D.A. 1551a). The Court of Appeals ruled that the trial Court did not abuse its discretion in denying severance, and that there was no prejudice to petitioner in the joint trial.

2. Deprivation of Fair Trial—in failing to grant motions for mistrial or to strike the testimony of Government witnesses, where F.B.I. agents had deliberately destroyed their original notes of interviews with such witnesses

The only witnesses implicating petitioner in the alleged offense of attempting to influence juror Fields were James Walker, a Nashville policeman, and Carl Fields, the son of Fields.

On cross examination Walker testified that he did not report the alleged occurrences which were the subject of Count III to the Nashville police officials (II D.A. 655a-687a), nor to Federal agents until they came to him (II D.A. 655a-658a). He conferred with Government representatives about a dozen times (II D.A. 633a-665a). F.B.I. agent Sheets made notes of his conference with Walker (II D.A. 667a). Walker also testified that there may have been misunderstandings between him and Sheets as to the questions asked and the answers given (II D.A. 721a-722a). Walter Sheridan, Special Investigator for the Department of Justice (II D.A. 675a) made notes while interrogating Walker. No charges were ever filed against Walker with the Nashville police authorities concern-

ing his part in the case (II D.A. 687a) and he is still a police officer (II D.A. 727a).

On cross examination, Carl Fields stated he had two conversations with F.B.I. agent Sheets, who made notes (II D.A. 753a). In his testimony at the trial Fields contradicted his statements to the F.B.I. (II D.A. 757a). He testified that he deliberately told the F.B.I. a pack of lies (II D.A. 757a, 760a). He also made a false affidavit concerning the matter (Ex. 4, II D.A. 757a).

The original F.B.I. notes made during the interrogation of Government witnesses Walker and Fields were demanded by the defense (II D.A. 754a, 667a-669a). The Government stated that it is F.B.I. practice to destroy the original notes and that this was done with the original notes on Walker and Fields (II D.A. 667a, 668a, 694a, 695a-697a, 786a). Motions by petitioner to strike the testimony of witnesses Walker and Fields pursuant to 18 U.S.C. Sec. 3500 (II D.A. 695a) and for a mistrial (II D.A. 696a-697a), were denied.

The Court of Appeals ruled that, since the defense was supplied with the final typed F.B.I. reports and certain signed statements of Walker and Fields, the F.B.I. was not required to preserve the agent's handwritten notes.

3. Incorporation of statements in petitions of co-petitioners concurrently filed

Petitioner incorporates herein by reference the Statements of the case and facts set forth in the Petitions for a writ of certiorari filed concurrently herewith by his co-petitioners Hoffa, Campbell, and King, insofar as applicable to petitioner. These Statements are made with reference to reasons for granting the

writ which petitioner is adopting. If statements with respect to these reasons were set forth herein, they would not materially differ from those of the co-petitioners.

REASONS FOR GRANTING THE WRIT

1. Deprivation of Fair Trial—by the trial Court's failure to grant a severance both prior to trial and during the course of the trial

There is much confusion in the law involving the right of defendants to be separately tried, which right results from the interplay of sections 8 and 14, F.R. Crim Proc.

This question is not purely procedural but concerns substantial and important basic rights. In *McElroy* v. *United States,* 164 U.S. 76, the Court ruled that severance is required "where the offenses are in no wise parts of the same transaction, and must depend upon evidence of a different set of facts as to each or some of them . . . [so that] the attention of the jury" may be distracted from a particular charge (at p. 81). In *Kotteakos* v. *United States,* 328 U.S. 750, the Court held that there was prejudice in a joint trial of several counts, each charging a conspiracy to violate the National Housing Act, when the only nexus among them lay in the fact that one man participated in each conspiracy. There, as here, the alleged central moving figure was the prime beneficiary of the evil charged in each of the counts. The Court stated that (at p. 774): "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can really say prejudice to substantial right has not taken place."

A reading of *Schaffer* v. *United States*, 362 U.S. 511, shows a need for further clarification of the law in this area. There are many significant differences in the present case from *Schaffer*, which was a 5 to 4 decision.[3] There severance was not required before trial because the conspiracy count in that case was jointly tried with the substantive counts. Only after the court granted a motion dismissing the conspiracy count at the end of the Government's case did the question of misjoinder arise. The holding of the majority is simply that failure to prove the conspiracy count did not require a mistrial. In this case the severance of the conspiracy count before trial destroyed any basis for joint trial of the separate substantive offenses.

The ruling below also conflicts with *United States* v. *Kelly*, 349 F. 2d 720 (C.A. 2).[4] In *Kelly*, the Second circuit ruled that the trial Court should have granted one defendant a severance during the course of the trial when a mass of prejudicial evidence was admitted against his co-defendants, making it difficult, if not impossible, for the jury to compartmentalize the evidence concerning such defendant. This was in keeping with this Court's admonition in *Schaffer* that "The trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." (at p. 516). The trial Judge here, notwithstanding severance of the conspiracy count, again and again instructed on the law of conspiracy, thus implicating petitioner in crimes of which he was not charged. Fur-

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[3] The dissent of Mr. Justice Douglas, with whom Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Brennan concur, would clearly require reversal here.

[4] Cf. *United States* v. *Haupt*, 136 F 2d 661 (C.A. 7).

ther, because of the joint trial petitioner was deprived of the right of cross-examination in an important and appropriate area.

2. Deprivation of Fair Trial—by the F.B.I. agents' deliberately destroying their original notes of interviews with the principal witnesses against petitioner, which witnesses had admittedly given inconsistent statements, thus depriving petitioner of due process and the right to effective cross examination

The Court of Appeals ruled that since the defense was supplied with the final typed F.B.I. reports and certain signed statements of Walker and Fields, the F.B.I. was not required to preserve the agent's handwritten notes. The question of whether the Government may deliberately destroy the handwritten notes which an agent makes contemporaneously with the interview of a witness, thus depriving the defense of their use for cross-examination, is an important aspect of law in the administration of justice not heretofore decided by this Court.

When records contemporaneously made in an F.B.I. interview are not in the possession of the Government because they have been *inadvertently* lost, mislaid, misfiled, or casually destroyed, they may not be deemed in the possession of the Government under 18 U.S.C. Sec. 3500, and need not be produced. *Campbell* v. *United States,* 365 U.S. 85, 102. However, when a Government agent *deliberately* destroys his records pursuant to a policy of his administrative agency or instructions of that agency, such action serves to prevent an accused from testing the accuracy of the narrative statements contained in the report produced for examination with the records contemporaneously made and which is the very basis of the report produced.

Unless an alien concept of infallible statism is to be exalted, the deliberate destruction by Government agents of evidence pursuant to administrative policy resulting in the obviation of the effect of § 3500 must be deemed also an improper suppression of evidence repugnant to due process. Especially is this true when, as here, both Walker's and Fields' testimony are in material contradiction of prior statements.

Such deliberate destruction of evidence falls squarely within the principles of *Brady* v. *Maryland,* 373 U.S. 83, where a conviction was reversed because the State did not disclose to the defendant a confession of a co-defendant, favorable to the defendant, though material only as to the matter of punishment. This Court held that to be true even if the non-disclosure is in good faith. *A fortiori,* where the Government deliberately destroys evidence, whether or not in good faith, the case must be reversed, or at least, the testimony of the witness interviewed should be stricken.

The Court of Appeals here ruled that the "question was one of fact for determination by the District Judge, whose decision we may not disturb unless clearly erroneous." Thus, the Court held that the denial of such reports to petitioner was not erroneous, in that the defense had available for the purpose of cross-examination the signed statements of the witnesses involved as well as the F.B.I. reports. It thus held that such statements and reports contained the substance of the interview notes, and that the F.B.I. agents were under no duty to preserve their longhand and shorthand records from which the statements and reports were prepared (349 F 2d at 47-48).

The Court of Appeals on September 9, 1965, after the rendition of its decision herein, decided the case of

United States v. *Lonardo,* 350 F 2d 523 (C.A. 6). In *Lonardo,* the Court reversed a conviction because of the destruction prior to trial of interview records taken by the F.B.I. of government witnesses. There, as here, the F.B.I. agent used the interview records in preparing formal F.B.I. interview reports. There, as here, the interview records were destroyed in accordance with F.B.I. procedures calling for such destruction, once the formal interview reports had been prepared. Nevertheless, in *Lonardo,* the Court held that the prejudice ensuing to the accused from the destruction of such records might not be remedied by the striking of the witness' testimony, and that it required the reversal of the conviction and the granting of a new trial. The Court held that such prejudice was not erased by the trial court's instruction to the jury that it could infer from such destruction of records that the records contained matters which were unfavorable to the Government.

In its decision in the instant case, the Court said with regard to the destruction of the records:

> "There is nothing to suggest bad faith in what the agent did." 349 F 2d at 47.

In *Lonardo,* the Court said:

> ". . . we see no need to characterize the destruction of these statements as in good faith or bad—as honest or corrupt. These were no long lost documents or clerical filing errors. The destruction was deliberate; it was on the eve of trial; it was accomplished by the government agent in charge of preparing evidence for the prosecution of the case. The fact that the agent who destroyed them may have done so in reliance upon FBI regulations (or in good faith belief that such existed) does not

alter the nature of the sanctions imposed by the statute." 350 F 2d at 529.

The majority decision in *Lonardo* expressed the belief that the decision in that case was "entirely consistent" with the ruling in the instant case, because here there was a finding by the trial court that the F.B.I. agent's records were not Jencks Act statements required to be produced. The consistency of *Lonardo* with the instant case is clearly questioned in the dissenting opinion in *Lonardo*. Indeed, the dissent cites the instant case as authority for affirming the lower court's judgment in *Lonardo*. Certainly, then the two decisions are in utter conflict.

Lonardo stated that its holding was restricted to the situation where the defendant is not furnished by the F.B.I. report the same information contained in the statement which had been destroyed. Certainly, even in light of this limitation, there was enough to call for a reversal here since there was testimony that certain witnesses for the Government, namely, Pitts, Walker, Fields and Paschal, had admitted making prior material statements to the F.B.I., contrary to their testimony at the trial (II D.A. 1077a-1079a, 1057a, 756a-760a, 721a-722a; III D.A. 1120a-1125a, 1129a, 1155a).

It is significant that in cases where the Government by design or by negligence restricts the defendants from evidence to which they are entitled, a reversal of the conviction is the usual result. *United States* v. *Consolidated Laundries Corp.*, 291 F 2d 563 (C.A. 2).

Where the F.B.I. deliberately and willfully destroys original interview records of their own Government witnesses, who, at the very threshold of the F.B.I. in-

vestigation, give materially inconsistent statements on the most important issues inherent in the Government's case, and thereafter, at trial, the defense is precluded by such destruction from a full, searching and adequate cross-examination of such witnesses, the defense must be entitled to an order striking all the testimony of such witnesses, or to a mistrial. In keeping with the holding in *United States* v. *Heath* (D.C., Hawaii), 147 F. Supp. 877, app. dism., 260 F 2d 623 (C.A. 9), where the district judge dismissed an indictment where documentary evidence relevant to the charges and necessary for the defense was lost by Government agents, and *Napue* v. *People of State of Illinois,* 360 U.S. 264 enunciating the principle that willful suppression does not cease to apply merely because the testimony goes only to the credibility of the witness, the indictment against petitioner should be dismissed. It is inescapable that the F.B.I. knew from its interviews that the credibility of the witnesses Carl Fields and Patrolman Walker would be the most important single issue for the jury's determination in the case against petitioner. The F.B.I.'s willful destruction of its original records of these witnesses was thus reasonably anticipated to prevent proper cross-examination in behalf of petitioner and his co-defendants.

3. Incorporation of Reasons for granting the Writ advanced in petitions of co-petitioners concurrently filed

As to Questions Presented numbered 3 through 14, Petitioner incorporates herein by reference the Reasons advanced with respect thereto in the petitions filed concurrently herewith by his co-petitioners Hoffa, Campbell, and King. If such reasons were set forth herein, they would not materially differ from those advanced by co-petitioners.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

JACQUES M. SCHIFFER
Counsel for Petitioner

December, 1965